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No. 87-838

In The

Supreme Court of the United States

October Term, 1987

HOWARD WILLIAMS,

Petitioner,

v.

INDIVIDUAL MEMBERS OF THE BURKE COUNTY SCHOOL BOARD, namely: BRUCE HAWKINS; ELEANOR BUTLER; TERRY CHILDRESS; JOHN MULL; SAM WAKEFIELD; BEN COZORT; J. T. KINCAID; JAMES D. WILSON, Superintendent of Burke County Schools; FRED CRANFORD; ERWIN HALLYBURTON; T. W. WALL; BILLY CAROWAY; GARY OGLE; ED HARDIN,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Petitioner contends that certiorari should be granted on the grounds that the affirmation by the Fourth Circuit of the District Court Judgment (1) places it in conflict with the decisions of other courts and (2) "sanctions" a serious departure from the accepted and usual course of judicial proceedings. Each of these contentions

requires an incredibly giant leap in argument, causation, and logic that is insupportable from the evidence.

The Petitioner has artfully crafted the proposition that the Fourth Circuit "implicitly decided" that a plaintiff may not satisfy his burden of proof that his protected expression was a substantial or motivating factor in his dismissal except by direct evidence of unlawful motive and that circumstantial evidence may not be admitted for such purpose. Had the Fourth Circuit so held, there may very well have been demonstrated a conflict.

Review of the evidence reveals, however, that such was not the decision of the Fourth Circuit, "implicit" or otherwise. Rather, the decision of the District Court, affirmed by the Fourth Circuit, is more fairly characterized as a determination that the Petitioner has failed utterly, in the first instance, to demonstrate any reasonably plausible connection between his expressions and his ultimate dismissal.

The Petitioner, for purposes of his present action, attributes his difficulties with the school system to two instances of expression. (In other proceedings, the Petitioner has diligently attempted to demonstrate his adequacy as a classroom teacher and has been unsuccessful.) (1) In early 1983, he met privately with the Superintendent of Schools and expressed objection to Principal Wall's allowing rock concerts. (2) In October, 1983, he wrote a newspaper article critical of merit pay proposals, as to which the Petitioner has offered no evidence of displeasure, criticism, or even adverse comment from any school administrator, other than a statement attributable to Principal Caroway that he was not in agreement. In-

deed, as the District Court Judge observed, in essence, the newspaper opinion was quite innocuous and unobjectionable, by its very nature.

Therefore, by mere juxtaposition in time—indeed, times widely separated—the Petitioner introduces his instances of expression and his ultimate dismissal, and contends one has been caused by the other. The Petitioner cannot sustain the burden of proof imposed upon him by simple chronology of events.

The Petitioner attempts to connect his expressions to his dismissal by evidence of transfer from East Burke High School to Morganton Junior High School and by increased administrative activity, which, for such purposes, he characterizes as "interference." The transfer, referred to as a transfer to a "lower" school, was indeed lower only in the sense of age of children. The transfer was entirely permissible administratively, and was not in any respect a negative or prejudicial decision as to the Petitioner or his career, status, tenure, salary, or otherwise.

Upon commencing at the transferee school, Morganton Junior High School, the Petitioner, as the evidence shows, taught his classes and went about his duties for a significant period of time without more than the typical observation, involvement, or intervention by his superiors. Administration activity, again characterized by the Petitioner as interference, commenced upon the considerably growing number of occasions and instances in which the Petitioner was losing control of his classroom. Further, the "interference" consisted of activity customarily used by the school system in attempting to help its teaching staff with discipline and other problems. When these

efforts failed, and were resisted by the Petitioner, then, and only then, did the administration begin to move toward dismissal.

Secondly, the Petitioner contends that "by failing to comment upon the manner in which this trial was conducted, the Court of Appeals sanctioned a serious departure from the accepted and usual course of judicial proceedings." In essence, the Petitioner has sought to support this contention by picking and choosing items from the trial transcript in order to attempt to establish and demonstrate an attitude, predisposition, and predetermination by the trial judge.

Parties to litigation are entitled to, and the trial judge is responsible for enforcing, orderly procedure. The Petitioner, without counsel, often claimed difficulty in not being knowledgeable as to procedure. His difficulties, to some extent, had an effect upon the conduct of trial. Maintenance by the judge of customary and usual order in the proceedings was rendered more difficult because of this factor. The Petitioner contends that the various statements of the trial judge in this context demonstrate, in what amounts to a quite serious accusation, that the judge had (1) determined the outcome of the case before trial commenced, and that he had (2) determined to deny the Petitioner a trial on the merits. On the contrary, the judge's attitude and statements were a reflection of the difficulty encountered on account of the Petitioner's repeated failure to abide by instructions and rulings and especially the Petitioner's several editorial comments upon the manner in which he was being allowed to proceed.

The Petitioner's attempts to demonstrate the judge's pretrial attitude commence, in his Petition, by quotation of statements and questions by the judge as to the Petitioner having retained no lawyer, which exchange took place at the close of the trial. The Petitioner contends these comments "confirm what is obvious throughout the trial." While one might speculate, for his own purposes, what might have been in the mind of another, there has been no legally valid showing that the judge, who obviously felt that a lawyer would have been helpful to the Petitioner, had reached a pretrial decision because the Petitioner appeared without one.

Next, the Petitioner refers to the judge's development of a series of stipulated matters prior to the commencement of testimony. Rules of court require that the parties attempt to stipulate as to uncontroverted matters prior to trial. As was reported in open court, the Petitioner and the attorney for the Respondents were unable to stipulate to anything. The Petitioner, perhaps because of his anxiety about possibly unknowingly prejudicing himself, was unwilling to do so. Consequently, in a manner which properly shortened the proceedings, the Court walked the parties through a series of stipulations which dealt with any procedural due process issues. Although the judge did conduct this segment, the Petitioner did in every instance agree to the truth of the stipulated matters, for indeed they were all true, and no controversy existed as to prior proceedings.

Finally, the Petitioner complains of the summary manner in which the judge did not permit evidence as to his performance as a teacher. Initially it is noted, as recited in the District Court's Memorandum of Decision, there

did in fact take place the receipt of testimony of witnesses, called by the Petitioner, who testified as to his competency, which evidence was not supportive of the Petitioner's position. Of more fundamental significance, however, is the proposition, equally as supportable as the Petitioner's contention, that the Court had concluded that the Petitioner had failed, *in the first instance,* to carry his burden of showing his protected expression bore any causal connection as a substantial or motivating factor in his dismissal. In such case, the Petitioner was not entitled to present evidence that the stated grounds for his dismissal, his inadequate performance, was indeed a pretext. The Court's directives were that further evidence as to competency was not to be considered. By this stage of the trial, there had been introduced as part of the Plaintiff's case evidence both as to his being a competent teacher (the Petitioner's own testimony) and inadequate performance. The trial judge had discretion to limit what, according to his inquiries, was obviously going to be redundant evidence upon any issue there may have been as to performance.

CONCLUSION

The Petitioner's Petition should be denied because:

1. The Fourth Circuit did not "implicitly" decide that a plaintiff may not satisfy his burden of proof that his protected expression was a substantial or motivating factor in his dismissal except by direct evidence of unlawful motive and that circumstantial evidence may not

be admitted for such purpose. Therefore, there has been rendered by the Fourth Circuit no decision which is in conflict with the decisions of other courts.

2. The Fourth Circuit did not, by its failure to "comment" thereon, sanction a serious departure by the District Court Judge from the accepted and usual course of judicial proceedings for there was no such serious departure.

Respectfully submitted,

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